



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 23, 1998

Mr. Wil Galloway  
General Counsel  
Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711-2847

OR98-1028

Dear Mr. Galloway:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114247.

The Texas Department of Agriculture (the "department") received two requests for information relating to loans made by the Texas Agricultural Finance Authority ("TAFA").<sup>1</sup> You have submitted several loan applications to this office for review. You ask whether these loan applications are excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified the loan applicants and their banks about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act

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<sup>1</sup>The requestors are seeking several other categories of information. The department has made much of this other information available to the requestors. The department sought a ruling from this office as to whether some of this other information is excepted from required public disclosure. That matter was assigned ID# 114248 and addressed in a separate opinion, Open Records Letter No. 98-0893 (1998).

in certain circumstances). This office received responses from: Agri-Gold Inc., Alvin State Bank, Certenberg Vineyards, Comerica Bank Texas, Commercial State Bank, Crowell State Bank, Ekstrom Enterprises, Elmore & Stahl, Inc., Farm Credit Bank of Texas, First National Bank of Bellville, First Bank & Trust Company, Frost Bank, G.E. Pogue Seed Co, Inc., Mr. Joe Harkness, Jensen Ranches, Inc., Moda Knitting Mills Limited, Moore Development for Big Spring, Inc., Nations Bank Texas, N.A., Norwest Bank Texas, N.A., Norwest Bank Texas, South, N.A., Ringgold Farms, Sesaco Corporation, Ms. Barbara N. Sides, Strube Packing Co., Wellington State Bank, and Wendland's Farm Products.

These banks, companies, and individuals contend that the requested loan applications are excepted from disclosure under sections 552.102, 552.103, 552.104, 552.107, and 552.110 of the Government Code. They also argue that the loan applications are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the following: the right to privacy, 12 U.S.C. § 3401 et seq., 12 C.F.R. § 618.8300 et seq., Civ. Prac. & Rem. Code § 30.007, Fin. Code § 59.006, and several rules of civil evidence and civil procedure.<sup>2</sup>

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Therefore, since we will address the common-law right to privacy later in this ruling, we need not engage in a separate discussion of section 552.102.

Sections 552.103, 552.104, and 552.107 protect the interests of governmental bodies, not third parties. *See* Open Records Decision Nos. 630 (1994) (governmental body may waive section 552.107), 592 (1991) (section 552.104 does not protect interests of private parties that submit information to governmental body), 551 (1990) (governmental body may waive section 552.103). The department invoked section 552.104 but did not explain how it applies to the requested information. *See* Open Records Decision No. 541 (1990) (section 552.104 requires showing of some actual or specific harm in particular competitive situation). The department chose not to raise section 552.103 or section 552.107. Thus, we conclude that none of these three sections except the requested information from disclosure.

Several third parties claim that certain rules of civil evidence and civil procedure make the requested information confidential. We note, however, that chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not

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<sup>2</sup>Several third parties also claim that their loan applications are not responsive to the requests for information. As to whether specific information is responsive to a particular request, we generally rely on the determination of the governmental body requesting our opinion. *See* Open Records Decision Nos. 554 (1990), 552 (1990). In this case, the department communicated with the requestors and clarified those items of the requests that were unclear. We believe that the department has accurately identified the documents that the requestors are seeking.

authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). The provisions of civil evidence and civil procedure to which the third parties cite regulate discovery in court proceedings and not the availability of information under chapter 552 of the Government Code.

The third parties also claim that the following statutes and regulations, in conjunction with section 552.101,<sup>3</sup> except the requested information from disclosure: 12 U.S.C. § 3401 et seq., 12 C.F.R. § 618.8300 et seq., Civ. Prac. & Rem. Code § 30.007, Fin. Code § 59.006. We disagree. These provisions only regulate the release of financial records by financial institutions. Thus, they are inapplicable to the release of records by a Texas state agency under the Open Records Act. These provisions are not applicable to the request at issue.

Next, we will consider whether any of the requested information is protected the common-law or constitutional rights to privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The requested loan applications contain personal financial information such as personal financial statements, personal credit histories, and personal bank account numbers. In Open Records Decision No. 373 (1983), we concluded that such information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law

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<sup>3</sup>Section 552.101 excepts from disclosure" information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

Of course, personal financial information does not meet the test for common-law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis. In this case, we believe that releasing the summary financial information contained in the documents titled "Linked Deposit Application," "Loan Guaranty Program Summary," "Lender Loan Application," and/or "Credit Memorandum" is sufficient to satisfy the legitimate public interest in how and to whom TAFE awards agricultural loans. These documents contain the essential terms of the loans that TAFE has granted. See Open Records Decision Nos. 600 (1992), 523 (1989). On the other hand, we do not believe that the public has a legitimate interest in the detailed personal financial statements, personal credit histories, or personal bank account numbers of loan applicants. See Open Records Decision Nos. 620 (1993), 600 (1992). We have indicated, by sample markings on one loan application, which summary financial information the department should release and which detailed personal financial information the department should withhold. See Open Records Decision No. 385 (1983) (drawing distinction between: 1. basic facts regarding financial transaction between individual and governmental body, and 2. background financial information which may be protected by common-law privacy).

We point out that a corporation or business entity does not have a common-law right to privacy. See Open Records Decision No. 600 (1992). Thus, although the department must withhold detailed *personal* financial information from all loan applications, it cannot withhold detailed *corporate or business* financial information from disclosure unless the third party has established that the information is excepted from disclosure pursuant to section 552.110.

Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other

operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the business in question. See Open Records Decision No. 494 (1988) at 6; see generally *Freedom of Information Act Guide & Privacy Act Overview* (1995) 136-138, 140-141. As stated earlier, we believe that the public has a legitimate interest in how and to whom TAFA awards agricultural loans, and we believe that this interest is served by releasing the summary financial information contained in the documents titled "Linked Deposit

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<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

Application," "Loan Guaranty Program Summary," "Lender Loan Application," and "Credit Memorandum."

The following companies have established that some of the information in their loan applications is excepted from disclosure under section 552.110: Agri-Gold Inc., Ekstrom Enterprises, G.E. Pogue Seed Co, Inc., and Strube Packing Co. We have marked the information in these loan applications that is protected by section 552.110. Only the marked information may be withheld under section 552.110. None of the other third parties have demonstrated that information in their loan applications constitutes trade secrets or commercial or financial information, and therefore, none of the other third parties are entitled to protection under section 552.110. *See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret, 542 (1990) at 3.*

We note that the loan applications contain the social security numbers of the loan applicants. A social security number is deemed confidential by the 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 (1994).* The department must withhold the loan applicants' social security numbers from disclosure if it obtained them or maintains them pursuant to any provision of law enacted on or after October 1, 1990.

Finally, the loan applications also include tax return information that the loan applicants provided to the department. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the department must withhold all tax return information from disclosure under section 552.101 of the Open Records Act.

To summarize, the department must withhold the social security numbers of loan applicants from disclosure if required to do so by federal law. The department must withhold all tax return information from each of the loan applications pursuant to section 552.101 and federal law. The department must also withhold background *personal* financial information from all of the loan applications pursuant to section 552.101 and the common-law right to privacy. The department must withhold from disclosure the detailed *corporate or business* financial information of only those businesses that have established that this information is protected under section 552.110. The department must release the summary financial documents discussed above that set out the basic terms of the agricultural loans granted by TAFA, and any other information in the loan applications that is not otherwise protected from disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Karen Hattaway".

Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 114247

Enclosures: Marked documents

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All third party interests